92-1036

Supreme Court, U.S.
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Case No. _____

IN THE UNITED STATES SUPREME COURT

October-June 1992 Term

Lisle H. Moore, Jr., Petitioner

v.

Board of Education of Fulton Public School No. 58, Respondent

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On Petition for Writ of Certiorari
to the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Missouri Supreme Court applied an inappropriate standard of review of an administrative decision when the court deferred to the Respondent Board of Education's discretion in determining whether Petitioner received a fair hearing.

2. Whether Respondent Board of Education violated Petitioner's right to due process under the 14th Amendment to the United States Constitution when the Board denied Petitioner's request for a continuance of Petitioner's employment termination hearing when such request was made at 2:15 a.m. following seven and one-half hours of hearing.

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OPINIONS BELOW

On April 1, 1990, Respondent Board of Education of Fulton Public School No. 58 issued its Findings of Facts and Conclusions of Law in which Respondent stated its decision to terminate Petitioner's employment. The Findings of Facts and Conclusions of Law are contained in the Appendix beginning on page 16.

On September 14, 1990, the Callaway County Circuit Court, in Case No. CV590-155, captioned *Lisle H. Moore, Jr. v. Board of Education of Fulton Public School District*, issued an Order (which was amended on September 28, 1990 to correct typing errors) reversing the decision of Respondent Board of Education. The "Amended Order" is contained in the Appendix on page 34. On October 1, 1990, the Callaway County Circuit Court issued an Order amending the original findings of September 14, 1990 and overruling Respondent's motion to vacate the September 14, 1990 Order. The October 1, 1990 Order is contained in the Appendix on page 36.

On July 21, 1992, the Missouri Supreme Court, in Case No. 74255, captioned *Lisle H. Moore, Jr., Respondent v. Board of Education of Fulton Public School No. 58, Appellant*, issued its opinion reversing the trial court and reinstating the decision of Respondent. The principal opinion is contained in the Appendix beginning on page 37." Two Judges dissented in that case and the dissent is contained in the Appendix beginning on page 50. Petitioner moved for rehearing which was overruled on September 22, 1992, as shown by the notice contained in the Appendix on page 56.

STATEMENT OF GROUNDS FOR JURISDICTION

The judgment to be reviewed pursuant to the writ of certiorari is the opinion of the Missouri Supreme Court reversing the trial court and reinstating the decision of Respondent Board of Education and the Missouri Supreme Court's opinion was issued on July 21, 1992. Petitioner timely filed a Motion for Rehearing which was denied on September 22, 1992 (see Appendix at 56). The United States Supreme Court has jurisdiction to review this judgment pursuant to 28 U.S.C. § 1257(a) in that the judgment rendered by the Missouri Supreme Court made a determination concerning Petitioner's right to due process under the 14th Amendment to the United States Constitution, which raises a federal question.

CONSTITUTIONAL PROVISIONS AND STATUTES

ARTICLE XIV, UNITED STATES CONSTITUTION:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE V, UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE I, MISSOURI CONSTITUTION:

Section 10. Due process of law. That no person shall be deprived of life, liberty or property without due process of law.

§ 168.116 RSMo. (1986):

168.116. Termination by board--notice--charges.--1. The indefinite contract of a permanent teacher may not be terminated by the board of education until after service upon the teacher of written charges specifying with particularity the grounds alleged to exist for termination of such contract, notice of a hearing on charges and a hearing by the board of education on charges if requested by the teacher.

2. At least thirty days before service of notice of charges of incompetency, inefficiency, or insubordination in line of duty, the teacher shall be given by the school board or the superintendent of schools warning in writing, stating specifically the causes which, if not removed, may result in charges. Thereafter, both the superintendent, or his designated representative, and the teacher shall meet and confer in an effort to resolve the matter.

3. Notice of a hearing upon charges, together with a copy of charges, shall be served on the permanent teacher at least twenty days prior to the date of the hearing. The notice and copy of the charges may be served upon the teacher by certified mail with personal delivery addressed to him at his last known address. If the teacher or his agent does not within ten days after receipt of the notice request a hearing on the charges, the board of education may, by a majority vote, order the contract of the teacher terminated. If a hearing is requested by either the teacher or the board of education, it shall take place not less than twenty nor more than thirty days after notice of a hearing has been furnished the permanent teacher.

4. On the filing of charges in accordance with this section, the board of education may suspend the teacher from active performance of duty until a decision is rendered by the board of education but the teacher's

salary shall be continued during such suspension. If a decision to terminate a teacher's employment by the board of education is appealed, and the decision is reversed, the teacher shall be paid his salary lost during the pendency of the appeal.

§ 168.118 RSMo. (1986):

168.118. Termination hearing, procedure, costs. -- If a hearing is requested on the termination of an indefinite contract it shall be conducted by the board of education in accordance with the following provisions:

(1) The hearing shall be public;

(2) Both the teacher and the person filing charges may be represented by counsel who may cross-examine witnesses;

(3) Testimony at hearings shall be on oath or affirmation administered by the president of the board of education, who for the purpose of hearings held under sections 168.102 to 168.130 shall have the authority to administer oaths;

(4) The school board shall have the power to subpoena witnesses and documentary evidence as provided in section 536.077, RSMo, and shall do so on its own motion or at the request of the teacher against whom charges have been made. The school board shall hear testimony of all witnesses named by the teacher; however, the school board may limit the number of witnesses to be subpoenaed on behalf of the teacher to not more than ten;

(5) The board of education shall employ a stenographer who shall make a full record of the proceedings of the hearings and who shall, within ten days after the conclusion thereof, furnish the board of education and the teacher, at no cost to the teacher, with a copy of the transcript of the record, which shall be certified by the

stenographer to be complete and correct. The transcript shall not be open to public inspection, unless the hearing on the termination of the contract was an open hearing or if an appeal from the decision of the board is taken by the teacher;

(6) All costs of the hearing shall be paid by the school board except the cost of counsel for the teacher;

(7) The decision of the board of education resulting in the demotion of a permanent teacher or the termination of an indefinite contract shall be by a majority vote of the members of the board of education and the decision shall be made within seven days after the transcript is furnished them. A written copy of the decision shall be furnished the teacher within three days thereafter.

STATEMENT OF THE CASE

Petitioner Lisle H. Moore, Jr. ("Petitioner") was a band teacher employed by the Board of Education ("Board") of the Respondent Fulton Public School District No. 58 ("District"). Petitioner had been so employed for 20 years and was a permanent teacher pursuant to the Missouri Teacher Tenure Act (§§168.102 through 168.130 RSMo. 1986).

On May 19, 1989, Petitioner received a "warning letter" pursuant to §168.116.2 RSMo. On February 8, 1990, the Superintendent of the District served a "Statement of Charges" on Petitioner pursuant to §168.116.1 RSMo. Pursuant to §168.116.3, Petitioner made a timely request for a hearing. The District set the hearing for March 8, 1990. Prior to that date, Petitioner's counsel requested a continuance of 30 days in order to prepare for the hearing. In response to this request, the District rescheduled the hearing for March 19, 1990.

Section 168.118 sets out the requirements for the teacher termination hearing. (See "Constitutional Provisions and Statutes.")

On March 19, 1990, the hearing before the Board began at 7:05 p.m. At 2:15 a.m. on March 20, 1990, Petitioner's counsel requested that the Board continue the hearing until a later date. At that point in the hearing, the District had called four witnesses and had 11 more to call. Petitioner had approximately 20 witnesses sequestered in a classroom waiting to be called.

In response to Petitioner's request for a continuance, counsel for the District stated that "the problem we have in the time situation is that we are approaching board elections, and we have to have the same board hear the

case as renders a decision." The Board denied Petitioner's request for a continuance.

Petitioner's counsel objected to the denial on the grounds that Petitioner "would be denied due process under the state constitution and under the fifth and fourteenth amendments to the Constitution of the United States." The complete exchange which took place between Petitioner's counsel and the District's counsel is set out in the Missouri Supreme Court opinion. (See Appendix beginning on page 39.)

Following the Board's refusal to continue the hearing, Petitioner, Petitioner's counsel and Petitioner's witnesses left the hearing. The hearing continued with the District putting on evidence. The hearing ended at 5:48 a.m.

On or about March 22, 1990, Petitioner's counsel was provided with copies of exhibits from the hearing. In all, 131 exhibits were received by the Board. Five of those were joint exhibits submitted at the beginning of the hearing and the remainder were offered by the District. Also, on or about March 22, 1990, counsel for the District informed Petitioner's counsel that Petitioner could submit sworn affidavits from his witnesses who had not testified at the hearing. The affidavits were due by 5:00 p.m., March 28, 1990. Petitioner's counsel declined to submit affidavits.

On or about April 1, 1990, the Board issued its Findings of Fact, Conclusions of Law and Decision in which the Board stated its decision to terminate Petitioner's teaching contract. (See Appendix at 16.)

Pursuant to Missouri statutes, Petitioner appealed the Board's decision to the Callaway County Circuit Court. Following briefs and argument, the Circuit Court reversed the Board's decision, finding that "the request for continuance to a date certain by counsel for Petitioner was

reasonable and that the [District] abused its discretion and acted in an arbitrary and capricious manner in refusing this request. The Court finds that Petitioner was not afforded a fair hearing and that his rights under due process were violated." The full Circuit Court's Order is contained in the Appendix at page 34. The Circuit Court ordered that pending a full hearing, Petitioner be reinstated with back pay. The District filed a motion to vacate the Circuit Court's Order which was overruled.

On October 1, 1990, the District appealed to the Missouri Court of Appeals, Western District, which reversed the Circuit Court, and reinstated the Board's decision terminating Petitioner. Petitioner applied for transfer to the Missouri Supreme Court. The Missouri Supreme Court accepted transfer and, pursuant to Missouri Supreme Court Rule 83.09, heard the case as on an original appeal.

Following briefs and argument, the Missouri Supreme Court issued its opinion on July 21, 1992 and reversed and remanded to the Circuit Court with instructions to reinstate the decision of the Board. The Honorable Charles B. Blackmar dissented in a dissenting opinion in which the Honorable Albert L. Rendlen concurred. The principal opinion and the dissenting opinion are contained in the Appendix at pages 37 and 50, respectively.

Petitioner now seeks writ of certiorari to determine whether the Board abused its discretion when it refused to grant a continuance at 2:15 a.m.

ARGUMENT

Point 1: Standard of Review

Question presented: Whether the Missouri Supreme Court applied an inappropriate standard of review of an administrative decision when the court deferred to the Respondent Board of Education's discretion in determining whether Petitioner received a fair hearing.

In its opinion, the Missouri Supreme Court reversed the circuit court and affirmed the decision of the school board, stating:

> This Court *must defer to the agency* and, thus, is bound to uphold the agency ruling unless a clear abuse of discretion has been demonstrated. The burden of demonstrating such abuse rested on Moore. Although this a very close case, we find that the Board's decision to proceed with the cross-examination of the witness then on the stand was not unreasonable. *In view of the discretion lodged in the Board to grant or refuse a continuance and taking the Board's ruling in its most favorable light to the agency on appeal*, this Court concludes that the decision of the Board should be affirmed.

(Appendix at 48, emphasis added)

In its opinion, the Missouri Supreme Court is applying an improper standard of review in determining whether an administrative body has abused its discretion when the administrative body has made a ruling concerning the proper procedure for conducting its hearing. While there should be substantial deference given to the school board

concerning substantive questions, the issue of whether a hearing held before the Board is properly and fairly conducted should be a question of law. Decisions of administrative bodies on questions of law are not binding upon reviewing courts. *Wolfe v. Missouri State Training School for Boys*, 517 S.W.2d 138, 142 (Mo. banc 1974).

The principal opinion appears to be deferring to the Board's decision "to proceed with the cross-examination of the witness then on the stand." However, as pointed out by the dissenting opinion, there was absolutely no indication in the record that Petitioner's request that the hearing be continued would be granted following cross examination of the school's principal. In fact, the record shows that the only conclusion possible is that the Board would carry on with the hearing until its completion because of the Board's belief that the hearing needed to be finished in one sitting in order that a decision could be made before the upcoming school board election. As stated in the dissenting opinion:

> The suggestion that the Board's decision was limited to the cross-examination of the principal does not accurately reflect the record. The Board's counsel wanted to avoid, at all costs, the necessity for having to come back another night. How any recess could be directed, within this constraint, is difficult to fathom.

(Appendix at 52-53)

The entire exchange made between opposing counsel is set out in the principal opinion. The attorney for the district stated that "the problem that we have in the time situation is that we are approaching board elections, *and we have to have the same board hear the case as renders a decision.* We've got a 10-day delay on getting the transcript back, and then we have seven days for the board to

meet and consider it." (Appendix at 39)[1] The need to complete the entire hearing because of a time constraint was once again asserted by the school district's attorney at the end of the hearing when he stated to the Board:

> It is now March the 20th. By statute, the school district is required to, the school board is required to have a transcript within ten days. Having spoken with the court reporter, and having some experience, the reporter would be hard pressed to have it much before the expiration of the ten days, which would move us to March 30th.
>
> The board then would be, within the three days prior to the board election, would be required to read the transcript, which will be voluminous, schedule a special meeting of the Board of Education, conduct deliberations on this case, prepare written findings of fact and conclusions of law, and do all that within three days.

(Tr. 463-464)[2]

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[1] Both the principal and the dissenting opinions recognize that there was no requirement that the board which was ultimately to make the decision be the same board which hears all of the testimony. *See Webb v. Kansas City Board of Police Commissioners*, 736 S.W.2d 451, 454 (Mo. App. 1987) (administrative agency official not required to hear all the evidence before joining in a final decision).

[2] In a recent case, *Forehand v. School Board of Gulf County*, 600 So.2d 1187 (Fla. App. 1 Dist. 1992), the appellate court held that the school board's attorney should not have acted as prosecutor of the case against the teacher and as legal advisor to the school board at the evidentiary hearing because "in practice,

Finally, the Findings of Fact and Conclusions of Law issued by the Board confirm the Board's understanding that a decision needed to be reached before the election. In finding number 76 the Board stated that "due to the need to render a decision before the election of a new Board on April 3, 1990" and in finding number 78 it stated "[T]hat in response to counsel's demand for a continuance, counsel was advised that due to the proximity of the Board election. . ." (Appendix at 29-30)[3] The principal opinion discusses the Board's desire to complete the hearing in time to render a decision before the school board election and states:

> The Board points out that the hearing was held under strict time constraints because some members might be replaced at the Board election scheduled 14 days after the hearing. Section 168.118(5) provides that a transcript must be furnished to the Board within ten days following the hearing, leaving only three days until the election in which to make a decision

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impartiality and zealous representation are inherently incompatible in the same person at the same time."

[3] The dissenting opinion notes that "[a] detached observer might conclude that the Board was anxious to have the case decided so that it could be used in the campaigning for the approaching election." (Appendix at 52) Eliminating political influence in the employment of teachers was one purpose of the Teacher Tenure Act. In *Lopez v. Vance*, 509 S.W.2d 197, 203 (Mo. App. 1974), the court stated that "[The Teacher Tenure Act] was enacted for the benefit and advantage of the school system by providing such machinery as would tend to minimize the part that malice, political or partisan trends, or caprice might play. It established *merit* as the essential basis for the *right* of permanent employment." (Emphasis in original)

> and prepare written findings of fact and conclusions of law. *Although this schedule creates a problem, this does not justify the Board's failure to take the time necessary for a proper hearing, if, in fact, another session was required to properly complete the hearing.*

(Appendix at 44-45, emphasis added)

It must be remembered that at the time of the request for a continuance, 2:15 a.m., the District had called four of its witnesses and had 11 more to go. Petitioner had approximately 20 witnesses waiting to be called. As it was, the hearing ended at 5:48 a.m. This was without any cross examination of 12 of the District's witnesses. If Petitioner had remained and cross examined the witnesses, he would have been required to begin his case at a time considerably after 6:00 a.m.

Therefore, the time constraint imposed by the Board combined with the number of witnesses left to be examined make it clear that the only conclusion to be reached is that the Board intended to conduct the hearing to its completion, even though at least an additional session was required to properly complete the hearing.[4]

The dissenting opinion correctly concludes that "[t]he Court carries the principle of deference too far, in reform-

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[4] The hearing in this case should have been conducted over a series of evenings, as in *Saunders v. Reorganized School District No. 2 of Osage County*, 520 S.W.2d 29 (Mo. 1975), where the Missouri Supreme Court stated: "The hearings before the Board (conducted by counsel) were lengthy, consisting of several long evening sessions from June 13 to June 21, 1972, and consuming 553 pages of the transcript." *Id.* at 31. In Petitioner's case, the transcript consisted of 466 pages, which was without cross examination of 11 of the school district's witnesses and without presentation of Respondent's case.

ing the Board's manifest decision" and that the Court applied "inappropriate deference, without the least record support. We should not, in the interest of deference, condone manifest injustice." (Appendix at 53)

In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937), this Court recognized the need for courts to assure that litigants in administrative proceedings receive a fair and proper hearing and that the courts, not the administrative body itself, must determine whether the hearing was proper. This Court pointed out that administrative bodies have been entrusted with broad powers within the sphere of duty assigned to them by law and that these bodies have considerable discretion in carrying out their duties so long as they comply with constitutional requirements.

> Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. [citing cases] Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" [citing cases] of a fair and open hearing be maintained in its integrity. [citing cases] The right to such a hearing is one of "the rudiments of fair play" [citing cases] assured to every litigant by the Fourteenth Amendment as a minimal requirement. [citing cases] There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harass-

> ing delay, when that minimal requirement has been neglected or ignored.

Id. at 304-05.

Petitioner, as a tenured teacher in Missouri, has a constitutionally protected property interest in continued employment which entitles Petitioner to procedural, as well as substantive, due process before his teacher position with the Fulton Public School District can be terminated. *Thompson v. Southwest School District*, 483 F. Supp. 1170, 1183 (W.D. Mo. 1980); *Belton v. Board of Police Commissioners*, 708 S.W.2d 131, 137 (Mo. banc 1986). Due process is all the teacher has. Once the teacher receives a fair hearing in which the proper procedure is followed, the school board is free to terminate the teacher if there is substantial evidence to justify the termination. All that is asked of the school board is that it follow the proper procedure so that the teacher can, under reasonable and fair circumstances, present his evidence and cross examine the witnesses against him.

The question of whether a hearing is fair and properly conducted is for the courts. The administrative body which conducts the hearing should not be granted deference in determining whether or not a hearing is fair. To do so takes from the teacher the only right that he has in an administrative hearing, his right to due process.

Therefore, the Missouri Supreme Court should have reviewed the Board's decision to deny the motion for continuance as a question of law. Had the court done so, it would not have been required to defer to the Board's discretion. *Wolfe*, 517 S.W.2d at 142. The Missouri Supreme Court opinion has granted inappropriate deference to the administrative body and in so doing has performed a manifest injustice on Petitioner.

Point 2: Due Process

Question presented: Whether Respondent Board of Education violated Petitioner's right to due process under the 14th Amendment to the United States Constitution when the Board denied Petitioner's request for a continuance of Petitioner's employment termination hearing when such request was made at 2:15 a.m. following seven and one-half hours of hearing.

Once the proper standard of review is applied, the reviewing court must determine from the record whether Petitioner received a fair hearing or whether Petitioner's right to due process was violated by the Board.

The hearing required by the Due Process Clause must be meaningful and appropriate to the nature of the case. *Bell v. Burson*, 402 U.S. 535, 541-42 (1971). The reviewing court must look to "substance, not to bare form, to determine whether constitutional minimums have been honored." *Id.* at 541.

As pointed out by the dissenting opinion, all indications contained in the record were that the Board intended to proceed with the hearing until its completion due to the perceived time constraint. The principal opinion stated that "[w]e have little doubt that had the Board required Moore to complete the entire hearing at this session, that his right to a full and fair hearing as required by due process would have been violated." (Appendix at 47-48)

The record is clear that had Petitioner, his attorneys and his witnesses remained at the hearing, they would have been required to begin Petitioner's case at the conclusion of the district's case. It was extremely unreasonable to require Petitioner's witnesses to remain throughout the night and into the next day. Petitioner had

20 witnesses waiting in a classroom who had been there since 7:00 p.m. They would have been expected to testify sometime after 6:00 a.m. In addition, the principal opinion took judicial notice that at 2:15 a.m. most people are tired and not alert. (Appendix at 47) This would be even more true the longer the hearing progressed. As stated in the dissent: "It simply was not possible to conclude a meaningful hearing under these circumstances." (Appendix at 54)

Throughout the course of this appeal, no cases have been found with facts analogous to Petitioner's case. Respondent has cited cases which held that late night hearings did not violate due process. However, in each of these cases cited, except one, the hearing *finished* in the early morning hours. The only exception is *Williams v. Mayor & Board of Alderman*, 163 S.E.2d 239 (Ga. App. 1968) which is distinguishable from Petitioner's case. In that case, a police officer appeared before the Atlanta police committee on charges of violating rules and regulations of the police department. The committee reached the officer's case at 1:00 a.m. and the hearing was conducted until it finished five hours later. One ground argued by the policeman for reversal on appeal was that the hearing should have been continued due to the late hour. *Id.* at 241. The reviewing court found no error for the reason that, contrary to Petitioner's case, no motion for continuance was made. In addition, it is important to note that the case was reversed on other grounds. *Id.* at 242-43.[5]

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[5] Two judges in that case concurred in the opinion to reverse but thought the judgment should also be reversed because of the failure to conduct the trial at a reasonable hour. The concurring opinion stated: "[T]wo principles are overriding, common sense and public policy. They are enough for me.

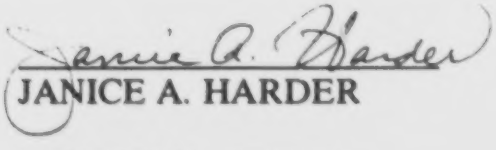
The record in Petitioner's case clearly shows that Petitioner's right to due process was violated when the Board refused to grant Petitioner's request for a continuance at 2:15 a.m. The circuit court correctly ruled that Petitioner had not received a fair hearing and that either a new hearing should be held or Petitioner should be reinstated.

Under the facts, to begin a five-hour trial about 1 a.m. violates the dictates of reason and humanity in the absence of counter-compelling reasons why it was necessary in the interest of justice and public policy to proceed at such a time to prevent a miscarriage of justice." *Id.* at 243.

CONCLUSION

In conclusion, Petitioner asks this Court to issue a writ of certiorari to the Missouri Supreme Court in order for this Court to determine the proper standard on review of questions involving the procedure followed in an administrative hearing and whether the hearing met the requirements of due process. Petitioner, and others in similar situations, must be able to look to the courts to uphold their right to due process. As stated by this Court, the right to a hearing is one of "the rudiments of fair play." *Ohio Bell Telephone Co.*, 301 U.S. at 304. The Board in this case did not "play fair" and it is left to this honorable Court to correct the injustice which has been done and to order the Board to conduct a *fair* hearing before it terminates Petitioner's protected property right.

Respectfully submitted,



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APPENDIX

Findings of Fact and Conclusions of Law of Fulton Public School District No. 58 16

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BEFORE THE
FULTON PUBLIC SCHOOL DISTRICT NO. 58
BOARD OF EDUCATION

DR. DENNIS R. LEA,	)
SUPERINTENDENT,	)
FULTON PUBLIC SCHOOL	)
DISTRICT NO. 58	)
	)
v.	)
	)
LISLE H. MOORE, JR.	)

FINDINGS OF FACT

1. That at all times relevant hereto, Lisle H. Moore, Jr. has been a tenured teacher in the Fulton Public School District, No. 58 in Fulton, Missouri.

2. That Mr. Moore's assignment for the periods relevant hereto has been as a band instructor for the grades 6 through 12.

3. That on May 19, 1989, Mr. Moore was served with a Notice of Deficiency directing him, among other things, to comply with all directives written or oral of Fulton Public Schools administrators.

4. That during the week following the service of the Notice of Deficiency, Superintendent Dennis Lea and Principal Frank Buell met and conferred with Mr. Moore on two occasions to review the deficiencies and the required remediation.

5. That Mr. Buell was designated by Dr. Lea to work with Mr. Moore to resolve all deficiencies. Mr. Moore was advised of Mr. Buell's assignment in this matter.

6. That on or about May 11, 1989, Mr. Buell, by written memorandum, directed Mr. Moore to send to him a copy of the Worlds of Fun band trip information which Moore had sent to band parents. The purpose of Mr. Buell's request was to insure that parents were notified that the participation in the trip was optional. Mr. Moore failed to respond to Mr. Buell's memorandum dated May 11, 1989.

7. That on or about May 22, 1989, Mr. Buell verbally directed to Mr. Moore to submit a copy of the band trip information sent to parents. Moore failed to comply with Mr. Buell's verbal directive.

8. That on or about May 24, 1989, Mr. Buell requested that Moore comply with the May 11, 1989 memorandum. Again, Mr. Moore failed to comply.

9. That by memo on June 5, 1989, Mr. Buell again directed Mr. Moore to submit the requested information.

10. The information requested by Mr. Buell on May 11, 1989, was not received until June 6, 1989, well after the trip had been completed and the purpose for obtaining the information no longer existed.

11. That by memo dated February 10, 1989, Mr. Moore was directed not to leave students unsupervised for any period of time. Mr. Buell's memo of February 10, 1989 confirmed Buell's conference with Moore during which Moore was given the identical directive.

12. That on or about October 19, 1989, Mr. Moore, in violation of administrative directives left sixteen band students unsupervised at the Middle School from 8:20 to 8:50 p.m.

13. That by memo dated October 20, 1989, Mr. Moore was advised by Mr. Buell that his conduct in leaving band students unsupervised on October 19, 1989, was in violation of Board Policy JHFA. Mr. Moore was provided a copy of the policy and was directed to comply with that Board policy. Mr. Moore did not deny his violation of Board policy and made no response to Mr. Buell's October 20 memo.

14. That on October 26, 1989, Mr. Moore left approximately twenty to thirty band members unsupervised after band practice from 8:25 to 9:00 p.m.

15. That by memo dated October 20, 1989, Mr. Buell advised Mr. Moore that his actions in again leaving students unsupervised was in violation of Board Policy JHFA and, considering past directives, was insubordinate. Mr. Moore did not deny his violation of Board policy and administrative directive. In fact, Mr. Moore made no response to Mr. Buell's memo.

16. That Board Policy JHFA is consistently applied to all High School staff members.

17. That Mr. Buell routinely required all High School faculty members to submit copies of their semester exams. The purpose of this practice was to monitor the testing program and to insure compliance with Board Policy IKAA.

18. That on or about June 1, 1989, Mr. Moore was directed to provide Mr. Buell with a copy of his semester exam. Mr. Moore failed to comply with Mr. Buell's directive.

19. That on October 23, 1989, Mr. Moore was directed by written memorandum from Mr. Buell to supply copies of his semester exams from the 1988-1989 school year. Mr. Moore has failed to comply with Mr. Buell's memorandum of October 23, 1989. Mr. Moore is

the only High School faculty member who has failed to submit copies of their semester exams to Mr. Buell.

20. That on or about October 23, 1989, Principal Buell directed Moore to account for his extended contract time. Mr. Moore failed to comply with that directive or reply in any way to Mr. Buell's October 23 memo.

21. That on or about October 24, 1989, Mr. Moore was issued a directive from Principal Buell to reinstate Jennifer Anderson to the High School band and to allow her to march at the half-time band performance Friday evening. Mr. Moore failed to comply with that directive.

22. That when Mr. Buell learned that Moore had failed to comply with his directive of October 24, 1989, again directing Moore to reinstate Jennifer Anderson to the band. Moore failed to comply with Mr. Buell's memo.

23. That on or about October 26, 1989, Superintendent Lea directed Moore to comply with Mr. Buell's directives and to reinstate Jennifer Anderson to the band. Moore failed to comply with Superintendent Lea's directives.

24. That in spite of written and verbal directives from Dr. Lea and Mr. Buell, Mr. Moore refused to allow Jennifer Anderson to participate in band rehearsals on October 25, 26 and 27, 1989 and refused to allow Jennifer Anderson to participate in the half-time band performance of October 28, 1989.

25. By letter of November 17, 1989, Dr. Lea directed Mr. Moore to refrain from use of profanity in the presence to District employees.

26. That on or about April 25, 1989, Mr. Moore cursed Assistant Principal James Barton in the presence of students using such profanity as "fucking", "shit", "bullshit", "goddamn."

27. That Mr. Buell met with Mr. Moore and reprimanded him concerning his use of profanity to Barton. By written memo dated April 28, 1989, Mr. Moore was directed by Mr. Buell not to use profanity in front of the students.

28. That during band practices on or about January 9, 1990, Mr. Moore, in the course of disciplining student Steven Fischer, jerked Fischer's instrument to an upright position and said, "Life's a bitch, Steve."

29. That on or about November 10, 1989, Principal Buell and Assistant Principal Barton distributed inventory forms to all faculty members. The forms were to be completed and returned by December 5, 1989. Mr. Moore failed to complete and return his inventory forms by the required date.

30. That on or about January 10, 1990, Mr. Moore was again directed to submit a completed inventory form. Moore was given until January 15, 1990 to comply with the directive and advised that if there was any problem in completing the inventory within that time frame, to contact an administrator. Mr. Moore has not submitted an inventory and has not discussed his failure to submit his inventory with any administrator. Moreover, Moore is the only High School teacher who failed to submit an inventory.

31. Principal Buell requires all faculty members to submit their planning books on specific dates throughout the school year. During 1989-1990 school year, Mr. Moore was requested and repeatedly reminded to submit his planning book on nine occasions. In response, Mr. Moore failed to submit the required lesson plans on seven of the nine occasions and in fact ceased making lesson plans at all after November 6, 1989.

32. That Board Policy DJF requires that all purchase requisitions be approved by the principal and the central office before purchase orders are issued.

33. That on or about June 19, 1984 and again on July 6, 1987, Mr. Moore was reprimanded for repeated violations of Board Policy DJF in that prior approval had not been obtained before purchases were made. Mr. Moore was provided copies of policy DJF and directed to comply with its provisions.

34. During 1987-1988 school year, Mr. Moore made purchases from School Music Services, Inc. and St. Ann's Publications, Inc. without obtaining prior approval from the principal and without having completed the required purchase orders.

35. That Mr. Moore violated Board Policy DJF in making purchases without receiving his principal's approval including Invoice No. 20626 dated 1-10-89, to School Music Services, Inc.; Invoice No. 20708 dated 1-24-89 to School Music Services, Inc.; and Invoice No. 20730 dated 1-31-89 to School Music Services, Inc.

36. That Board Policy GCJ, Professional Staff Time Schedules, provides in pertinent part that, "a teacher shall not leave the school premises during school hours unless proper arrangements have been made and the consent of the principal obtained." Policy GCJ further provides that "Each teacher shall report for duty at least twenty (20) minutes before the scheduled daily opening of school. Unless special permission is given by the principal, no teacher should leave for the day until at least fifteen (15) minutes after the regularly scheduled time for dismissal of pupils within the building." During the relevant periods, the scheduled time for dismissal of pupils within buildings in the district was not earlier than 3:00 p.m.

37. That on or about September 26, 1988, Mr. Moore was absent from school premises without completing sign out procedures and without administrative authorization.

38. That on or about September 29, 1988, at approximately 2 p.m. Mr. Moore left school premises and went home without having made proper arrangements, without having signed out and without having received his principal's permission.

39. That on or about October 3, 1988, Fulton School District Principal Robert Broemser advised Mr. Moore that his absences on September 26 and September 29 were in violation of Board policy. Mr. Broemser's memo of October 3, 1988 directed Mr. Moore to comply with policy GCJ. In response to that memo, Mr. Moore directed Broemser to "look for me [Moore] personally until you find me, then fire my ass."

40. That by memo of October 21, 1988, Principal Buell confirmed meetings with Moore regarding the need to comply with the sign out procedure. During the meetings referred to in Mr. Buell's memo, Moore was referred to Board Policy GCJ and directed to comply with that policy.

41. That on or about October 26, 1988, at approximately 2 p.m., Mr. Moore left school premises without having made proper arrangements, without signing out and without having obtained the principal's approval.

42. That Dr. Lea met with Mr. Moore on or about October 28, 1988 concerning his violations of Board Policy GCJ. Dr. Lea confirmed this meeting with a memo dated November 2, 1988, directing Moore to comply with Policy GCJ.

43. That on or about November 15, 1988, Moore was absent from school premises without having made proper

arrangements, without having signed out and without having received his principal's permission.

44. That on or about February 27, 1984, then High School Principal Lamar Hicks advised Moore against writing bail bonds during school hours. Hicks further advised that if it became necessary for Moore to be away from the building for any reason that he was to obtain permission from the principal.

45. That on or about January 12, 1988, Mr. Moore was absent during school hours at approximately 11:55 a.m. for the purpose of meeting a bail bond for Paul E. LaValle. At that time Mr. Moore was scheduled for planning duties at the Fulton Middle School for which he was compensated by the District. On January 12, 1988, Moore was absent from school without having made proper arrangements, without having signed out and without receiving his principal's permission.

46. On or about February 10, 1988, Mr. Moore was absent during school hours at approximately 12:10 p.m. for the purpose of writing a bail bond for Deronda K. Clark. At that time Mr. Moore was scheduled for planning duties at the Fulton Public Schools for which he was compensated. On February 10, 1988, Moore was absent from school without having made the proper arrangements, without having signed out and without having received his principal's permission.

47. That on or about February 29, 1988, Mr. Moore was absent during school hours at approximately 12:55 p.m. for the purpose of writing a bail bond for Brenda Curry. At that particular time, Mr. Moore was scheduled to provide planning services in the Fulton Public Schools for which he was compensated by the District. On February 29, 1988, Mr. Moore was absent from school without

having made proper arrangements, without having signed out and without having received his principal's permission.

48. That on or about March 22, 1988, Mr. Moore was absent during school hours at approximately 12:15 p.m. for the purpose of writing a bail bond for Charles McCann. At that time, Mr. Moore was scheduled to perform planning services in the Fulton Public Schools for which he was compensated by the District. On March 22, 1988, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

49. That on or about April 19, 1988, Mr. Moore was absent during school hours at approximately 3:14 p.m. for the purpose writing a bail bond for Robert L. Prichett. At that time, Mr. Moore was scheduled to perform services in the Fulton Public Schools for which he was compensated by the District. On April 19, 1988, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

50. That on or about April 21, 1988, Mr. Moore was absent during school hours at approximately 12:15 p.m. for the purpose writing a bail bond for Thomas Nogalski. At that time, Mr. Moore was scheduled to perform planning services in the Fulton Public Schools for which he was compensated by the District. On April 21, 1988, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

51. That on or about April 28, 1988, Mr. Moore was absent during school hours at approximately 11:20 a.m. for the purpose writing a bail bond for Byron Brock. At that time, Mr. Moore was scheduled to perform services in the Fulton Public Schools for which he was compensated by

the District. On April 28, 1988, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

52. That on or about September 1, 1988, Mr. Moore was absent during school hours at approximately 2:50 p.m. for the purpose writing a bail bond for Stanley Truman. At that time, all teachers, including Mr. Moore, were scheduled to be in attendance at a District workshop for which Mr. Moore was compensated. On September 1, 1988, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

53. That on or about September 16, 1988, Mr. Moore was absent during school hours at approximately 1:30 p.m. for the purpose writing a bail bond for Mark Havrum. At that time, Mr. Moore was scheduled to be teaching sixth grade at the Fulton Middle School for which he was compensated. On September 16, 1988, Moore signed out to go to "Radio Shack" not to the Sheriff's Office. Moreover, Moore was absent to write a bail bond without having received his principal's permission.

54. That on or about September 19, 1988, Moore was absent during school hours at approximately 3:15 p.m. for the purpose of writing a bail bond for Elizabeth Wright. At that time, Mr. Moore was scheduled to be on duty at the Fulton Public Schools for which he was compensated by the District. On September 19, 1988, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

55. That on or about October 4, 1988, Moore was absent during school hours at approximately 12:50 p.m. for the purpose of writing a bail bond for John Albers. At

that time, Mr. Moore was scheduled to be engaged in instructional planning at the High School for which he was compensated by the District. On October 4, 1988, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

56. That on or about October 27, 1988, Moore was absent during school hours at approximately 11:30 a.m. for the purpose of writing a bail bond for Anna Miller. At that time, Mr. Moore was scheduled to be at the High School during lunch time for which he was compensated by the District. On October 27, 1988, Moore was absent from school without having made proper arrangements and without having received his principal's permission. Moore signed out at 11:35 a.m., five minutes after Miller's bond was written.

57. That on or about November 15, 1988, Moore was absent during school hours at approximately 9:25 a.m. for the purpose of writing a bail bond for Lawrence Foster. At that time, Mr. Moore was scheduled to be engaged in instructional planning at the High School and to be traveling to the Middle School to provide instructional services for which he was compensated by the District. On November 15, 1988, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

58. That on or about November 21, 1988, Moore was absent during school hours at approximately 11:30 a.m. for the purpose of writing a bail bond for James LaBrier. At that time, Mr. Moore was scheduled to be at the High School during his lunch period for which he was compensated by the District. On November 21, 1988, Moore was absent from school without having made proper arrange-

ments, without having signed out and without having received his principal's permission.

59. That on or about January 25, 1989, Moore was absent during school hours at approximately 11:56 a.m. for the purpose of writing a bail bond for Paul LaValle. At that time, Mr. Moore was scheduled to be engaged in instructional planning at the High School for which he was compensated by the District. On January 25, 1989, Moore was absent from school without having made proper arrangements and without having received his principal's permission. Moore did sign out at 12:00 for lunch. However, LaValle was released at 11:56 a.m. on bail.

60. That on or about March 16, 1989, Moore was absent during school hours at approximately 3:25 p.m. for the purpose of writing a bail bond for Gordon Smithee. At that time, Mr. Moore was scheduled to be at the High School rendering services for which he was compensated by the District. On March 16, 1989, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

61. That on or about March 20, 1989, Moore was absent during school hours at approximately 11:55 a.m. for the purpose of writing a bail bond for Clarissa Cole. At that time, Mr. Moore was scheduled to be engaged in instructional planning at the High School for which he was compensated by the District. On March 20, 1989, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

62. That on or about March 21, 1989, Moore was absent during school hours at approximately 9:30 a.m. for the purpose of writing a bail bond for David Maslowsky. At that time, Mr. Moore was scheduled to be engaged in

instructional planning and travel to the Middle School for which he was compensated by the District. On March 21, 1989, Moore was absent from school without having made proper arrangements, without having signed out and without having received his principal's permission.

63. That Board Policies JHFA and GBCB require that students not be left unsupervised by assigned staff members. Specifically, these policies provide in pertinent part that "no teacher or other staff member will leave an assigned group unsupervised except to make arrangements to take care of an "emergency"; Board GBCB requires that teachers need "to insure the students are under supervision at all times"

64. That on or about February 8, 1989, Mr. Moore left the band unsupervised.

65. That by memo dated February 10, 1989, Mr. Moore was directed not to leave the band unsupervised for any period of time as was specifically referred to Board Policies JHFA and GBCB.

66. That by memo dated October 20, 1989, Mr. Buell advised Mr. Moore that conduct in leaving band students unsupervised was in violation of Board Policy JHFA, a copy of which was attached to Buell's memo.

67. That Board Policy IKAA requires that all teachers in grades seven through twelve administer semester exams.

68. That Mr. Moore did not administer semester exams during the 1987-1988 school year.

69. That Mr. Moore did not administer semester exams during the 1988-1989 school year.

70. That Board Policy GBCB lists specific acts which are required of all professional and support staff. Among these requirements is Item 3 which mandates "diligence in submitting required reports at times specified."

71. That as previously set forth in the Findings of Fact, Mr. Moore failed to consistently submit his plan book as required during the 1988-1989 school year end, in fact, ceased keeping lesson plans at all after November 6, 1989.

72. That as previously noted in the Findings of Fact, Mr. Moore failed to submit semester exams as requested by his principal.

73. That also as previously noted, Mr. Moore failed to complete and submit the inventory forms required of all faculty members at the Fulton High School.

74. That after arrival of bail bondsman it requires ten to fifteen minutes between arrival and release of the prisoner in order to complete the bail bond process. Therefore, the release of persons (heretofore identified in these Findings of Fact) at the times shown by exhibits admitted into evidence before this Board, prove the presence of Lisle Moore at the Callaway County Sheriff's Office, and the absence of Moore from his school duties, at least ten to fifteen minutes prior to the time of release of said individuals from custody of the Sheriff of Callaway County, Missouri.

75. That the hearing in this case was originally set for March 8, 1990. Counsel for Mr. Moore requested a continuance of thirty days in order to prepare for the hearing.

76. That due to the need to render a decision before the election of a new Board on April 3, 1990, the Board offered and Mr. Moore agreed to conduct the hearing on March 19, 1990.

77. That prior to the conclusion of the hearing in this case, counsel for Mr. Moore demanded that the hearing be continued and threatened to walk out of the hearing if his demand was not granted.

78. That in response to counsel's demand for a continuance, counsel was advised that due to the proximity of the Board election and due to the continuance granted at counsel's request, at least some additional testimony would be required that evening. At that point Mr. Moore and his counsel voluntarily left the hearing and the hearing continued.

79. That Moore's witnesses were identified and present during the hearing and were prepared to testify before this Board. Further, this Board was prepared to entertain their testimony. At the time Mr. Moore voluntarily left the hearing, his witnesses left the hearing room and were unavailable to testify.

80. That on or about March 22, 1990, counsel for Mr. Moore was provided with copies of all exhibits entered after counsel left the hearing. Mr. Moore's attorney was also advised that she could submit sworn affidavits from Moore's witnesses who had already testified at hearing. Those affidavits were to be due at 5:00 p.m. March 28, 1990.

81. That by letter of March 27, 1990, counsel for Moore declined to submit any affidavits.

82. That at all times relevant hereto, the employment contract between the Fulton Public Schools and Lisle H. Moore, Jr. expressly incorporated the policies and regulations of the Fulton Board of Education into the contract. Moreover, the contract states that Moore agrees to be bound by the Board's policies and by executing the contract "acknowledges awareness of and access to a copy of the Board's policies and regulations."

83. That the policies and the regulations of the Board of Education have been published and two copies are available in each District school.

CONCLUSIONS OF LAW

1. The facts set forth in the Board's Findings of Fact manifest Moore's failure to comply with oral and written directives of Fulton Public School administrators. As such, Mr. Moore's specified conduct during the period from May 19, 1989 through February 8, 1990 constitutes insubordination.

2. The facts set forth in the Board's Findings of Fact establish that Mr. Moore was provided copies of and/or referred to Policies DJF, GCJ, JHGA, GBC-R, IKAA, and GBCB. In addition, Moore was repeatedly advised that his specified acts constituted violations of said policies. Moreover, by the terms of his employment contract, Moore agreed to be bound by Board Policies; acknowledged awareness of Board Policies; and acknowledged access to copies of Board policies. Accordingly, the evidence established that Lisle Moore had knowledge of the policies which he is alleged to have violated in these proceedings.

3. The facts set forth in the Board's Findings of Fact establish that after being referred to specific copies of Board policies and after being advised that his past conduct was in violation of said policies, Mr. Moore elected to again violate said policies.

4. Based upon Moore's knowledge of Board policies and based upon repeated admonitions to comply with Board policies, Moore's later acts violating said policies were willful within the meaning of Section 168.114 RSMo.

5. The facts contained in the Board of Education's Findings of Fact establish multiple violations of Board Policy DJF going back at least as far as the 1983-1984 school year. The evidence at hearing also establishes at least twenty-three separate violations over a two-year

period of Board Policy GCJ requiring teachers to remain on school premises during school hours and requiring authorization to leave school premises during that time. Moreover, the facts establish that Mr. Moore left students unsupervised in violation of the Board Policies JHFA and GBCB on at least four separate occasions. The evidence also established at least three violations of Board Policy IKAA mandating administration of semester exams. Finally, the evidence at hearing established that Moore failed to submit required reports in violation of Policy GBCB on at least twelve occasions over a two-year period. The repeated violations of Board policies as exemplified in the Board of Education's Findings of Fact constitute "persistent violation of Board policy" within the meaning of Section 168.114.

6. The Findings of Fact further establish that Lisle H. Moore, Jr. also failed to obey the published policies of the Fulton Board of Education as that term is defined in state statute.

7. The evidence established that Mr. Moore, in violation of school policies, and in violation of administrative directives used school time, for which he was paid by the school district, to engage in the personal business of writing bail bonds. Mr. Moore's motive was personal economic gain. Moore's conduct was conducted publicly and resulted in complaints from school district patrons.

8. The fraudulent taking of property, here school district compensation for work not performed, is a serious breach of the standards of acceptable behavior and constitutes immoral conduct within the meaning of Section 168.115 RSMo.

DECISION

The Board finds that the charges of insubordination, intentional violation of published regulations of the Fulton Board of Education, persistent violation of the published regulations of the Fulton Board of Education, failure to comply with the published regulations of the Fulton Board of Education, and immoral conduct have all been proved against Mr. Moore, and that proof of each of these charges taken and considered separately, as well as proof of all of these charges cumulatively, is sufficient to convince this Board that the indefinite teaching contract of Mr. Lisle H. Moore, Jr. with the Fulton School District should be terminated.

FULTON SCHOOL
DISTRICT NO. 58
BOARD OF EDUCATION

By _____
President

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing Board of Education's Findings and Fact and Conclusions of Law and Decision were served upon Mr. Lisle Moore to Box 231B, Fulton, Missouri 65251, and to Janice Harder, Esquire, 1001 East Walnut Street, Suite 300, Columbia, Missouri 65201.

_____

50151

IN THE CIRCUIT COURT OF
CALLAWAY COUNTY, MISSOURI

LISLE H. MOORE, Plaintiff, v. BOARD OF EDUCATION OF FULTON PUBLIC SCHOOL DISTRICT NO. 58, Defendant.	)	Case No. CV590-155

YOU ARE HEREBY NOTIFIED that on the 14th day of September, 1990, the court has entered the following:

An order to the following effect:

AMENDED ORDER!!!

"Court finds that the hearing in this matter before Respondent Board commenced at 7:05 p.m. on March 19, 1990, and concluded at 5:48 a.m. on March 20, 1990, a period of some ten hours fifty five minutes ("10:45) [sic]. Court further finds that at 2:15 a.m. on the morning of March 20, 1990, after approximately seven hours of testimony in the hearing, that the attorney for the Petitioner requested a continuance to a date certain to complete the hearing. Counsel among other things cited

the lateness of the hour, and that several witnesses for Petitioner who had not yet had an opportunity to testify were extremely tired. The request for a continuance was denied. Thereafter, Petitioner, counsel and witnesses withdrew from the hearing and did not participate further. The hearing continued with evidence from the School District until as noted 5:48 a.m. that morning when the hearing concluded. Petitioner was thereafter offered the opportunity to submit affidavits for consideration but declined. The Court finds that the request for Continuance to a date certain by counsel for Petitioner was reasonable and that the Respondent abused its discretion and acted in an arbitrary and capricious manner in refusing this request. The Court finds that Petitioner was not afforded a fair hearing and that his rights under due process were violated. Since a full, fair and complete hearing was not afforded Petitioner, the Court does not reach those matters raised in Points II and III. It is ordered that pending a full hearing, that the decision of the Board to terminate Petitioner be reversed and Petitioner ordered reinstated with back pay since the date of termination. Costs taxed to Respondent." FC

OPAL HEYING
Clerk of the said Court

/s/ Barbara Maupin
Deputy

IN THE CIRCUIT COURT OF
CALLAWAY COUNTY, MISSOURI

LISLE H. MOORE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV590-155
	)	
BOARD OF EDUCATION OF FULTON PUBLIC SCHOOL DISTRICT NO. 58,	)	
	)	
Defendant.	)	

YOU ARE HEREBY NOTIFIED that on the 1st day of October, 1990, the court has entered the following:

An order to the following effect: "Court amends original findings of September 14, 1990, and strikes from same "that several witnesses for Petitioner who had not yet had an opportunity to testify were extremely tired." Court declines to strike request to continue to a date certain. Order as amended being considered by Motion to Vacate, same overruled."

OPAL HEYING
Clerk of the said Court

/s/ Barbara Maupin
Deputy

SUPREME COURT OF MISSOURI
en banc

LISLE H. MOORE, Respondent, v. BOARD OF EDUCATION OF FULTON PUBLIC SCHOOL DISTRICT NO. 58, Appellant.	)	No. 74255

APPEAL FROM THE CIRCUIT COURT OF CALLAWAY COUNTY
Honorable Frank Conley, Judge

The Board of Education of the Fulton Public School District terminated the contract of Lisle H. Moore, Jr., a permanent teacher in the School District. The trial court reversed the Board's decision, finding the Board abused its discretion and violated Moore's due process rights by failing to grant a continuance during the night of the hearing. The Board argues the refusal to grant the continuance was not an abuse of discretion and, in any event, Moore waived any due process violation which might have been committed by leaving the hearing before its completion.

Moore was a tenured, permanent teacher under an indefinite employment contract with the Fulton School

District as defined by sections 168.104(4) and 168.106, RSMo 1986. On May 19, 1989, Fulton School District Superintendent, Dennis Lea, served Moore with a warning letter setting forth numerous deficiencies in Moore's job performance. On February 8, 1990, Lea served Moore with a Statement of Charges, including the following: (1) insubordination; (2) intentional violation of Board policy; (3) persistent violation of Board policy; (4) failure to comply with Board policy; and (5) immoral conduct. The Statement of Charges consisted of thirty-seven pages with more than 150 specific charges.

Pursuant to section 168.116, RSMo 1986, Moore requested a hearing before the Board to contest the charges. The Missouri Teacher Tenure Act, §§ 168.102-168.130, RSMo 1986, requires the Board to schedule a hearing no later than thirty days after service of the charges. The hearing was originally set for March 8, 1990, but Moore requested a continuance. The Board rescheduled the hearing for the evening of March 19, 1990.

The hearing began at 7:05 p.m. At that time, the President of the Board asked for everyone's cooperation and said, "It's very important that all board members get a chance to hear the full testimony of all the witnesses. We're going to try and get through this entire hearing in one night. It's going to be a long one, so please remain very quiet." The School District's evidence began with the direct examination of Mr. Moore. With the exception of a recess from 9:00 to 9:10 p.m., Moore's testimony, including direct and cross examination, continued until 10:25 p.m. At 10:50 p.m., the Board called two student witnesses and, upon Moore's request, Moore was allowed to call five student witnesses out of order so they could be excused. Next, the principal of the school testified on direct examination from 12:00 a.m. until 2:15 a.m. with a

break between 1:25 a.m. to 1:45 a.m. After direct examination of the principal, Moore's counsel requested that the Board continue the hearing until a later date. At this time, the following exchange took place between Mr. Mickes, counsel for the Board, Mr. Inglish and Ms. Harder, Moore's attorneys, and Mr. Borage, the Board President:

> MR. INGLISH: Mr. President, my name is John Inglish. I'm one of the attorneys for Mr. Moore, and at this point we would respectfully request that the board continue this hearing until some later date.
>
> MR. MICKES: Mr. Chairman, the problem that we have in the time situation is that we are approaching board elections, and we have to have the same board hear the case as renders a decision. We've got a 10-day delay on getting the transcript back, and then we have seven days for the board to meet and consider it.
>
> We're frankly running out of time, and we're in this position because plaintiff's counsel requested a continuance in order to get prepared, and so we're kind of in this box now because of that request and I would, appreciating the late hour of this hearing, I've certainly done them a lot later in the evening, I would suggest that we continue to proceed and cover as much ground, if not all the ground, as we can.
>
> MR. BORAGE: I recommend we proceed.
>
> MR. INGLISH: Is that the board's decision, that you're going to proceed tonight?
>
> MR. BORAGE: Yes.

MR. INGLISH: Mr. President, equally respectfully, I would like the record to reflect that this hearing commenced at 7:00 this evening, that we have approximately 20 witnesses out here sequestered in a room, that the district has had until what is now 2:15 a.m., and still has not completed its case, and that it is unreasonable to expect Mr. Moore to commence sometime here 3:00 or 4:00 o'clock in the morning to present his defense of these charges, and if the board has finally made its decision, then we object to that decision on the grounds that we would be denied due process under the state constitution and under the fifth and fourteenth amendments to the Constitution of the United States.

The hearing procedures set out in the Teacher Tenure Act presuppose due process of law, and we feel that we would be denied that due process if we are required to continue this hearing tonight, and we will not do so.

MR. MICKES: Mr. Chairman, I will state with equal respectfulness, if we had not granted counsel's request for a continuance, there would have been screams and hollers of failure to give them due process because they couldn't adequately prepare.

We consented to the continuance of this case to give them time to prepare for the case, and now when the time is completed to prepare the case, they are unable to proceed. So no matter what we do, we're going to be charged with violating due process. The witnesses are all here, I suspect that a good part

of Mr. Moore's testimony has already been covered in direct and cross, and we've already had, I believe four or five of the witnesses.

Whether we're able to complete totally tonight or not, we certainly have time to complete a substantial part of the case so we don't wind up having to do this another night. It would be very, very difficult to be able to schedule another evening when we can do this and still meet the framework and the time schedules of getting this thing completed.

MR. INGLISH: Mr. President, it is true that we did request a continuance, and I think the length of the testimony that has been presented here demonstrates why we needed that time in which to prepare. We did not ask that it be set tonight. Somebody else set it tonight. We didn't do that.

If there is a time constraint, it is not of our making, but we do feel very strongly that it would not be reasonable and a denial of due process to require us to continue to pursue this matter tonight and, again, respectfully we're not going to do so.

MR. MICKES: I suspect that we will go ahead and proceed whether you're here. My reaction would be to proceed with the hearing whether you choose to be here or not, Mr. Inglish.

MR. INGLISH: I'm sorry, but that's our choice.

MR. MICKES: Good night. Mr. Chairman, I'd like the record to reflect that upon receiving the board's intent to at least continue the

hearing for some time this evening to complete the testimony, we haven't even completed cross-examination of this witness, that Mr. Inglish announced his intention to, whatever the consequences, to leave the room and, in fact, has vacated the hearing room, and I would suggest to the board that we continue to complete the evidence in the case.

MR. BORAGE: So noted.

MR. MICKES: Since there is no one to cross Mr. Buell, I expect he can be excused at this time.

MR. BORAGE: Mr. Buell, you are excused.

MR. MICKES: Mr. Chairman would you ask if there's any cross-examination of this witness so we have a record?

MR. BORAGE: Is there any cross-examination of this witness?

MS. HARDER: Yes, there is, but not at this time. There would be in a continued case.

MR. MICKES: I think it's now or never. That would be my recommendation.

MR. BORAGE: So noted. The witness is excused.

Upon the Board's refusal to grant the continuance, Moore and his attorneys left the hearing.

The hearing proceeded until the case against Moore was completed, at 5:48 a.m. the next morning. Subsequent to the hearing, the Board offered Moore the opportunity to submit affidavits from his proposed witnesses, but Moore declined the opportunity. On March 31, 1990, the Board voted to discharge Moore. The Board issued findings of fact and conclusions of law setting forth the

basis for its decision. Moore appealed the decision to the Circuit Court of Callaway County.

The circuit court entered an order reversing the Board, finding the Board had arbitrarily and capriciously abused its discretion in denying Moore's demand for a continuance, and thus, the Board violated Moore's right to due process by depriving him of a fair hearing. On September 19, 1990, the Board filed a Motion to Vacate the Circuit Court's Order, which was denied. The Board appealed to the Missouri Court of Appeals, Western District. The court of appeals reversed the circuit court and reinstated the Board's decision terminating Moore. We granted transfer to consider the due process afforded Moore pursuant to Article I, Section 10, of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution.

In order to invoke the mandates of procedural due process, one must have been deprived of a property interest recognized and protected by the Due Process Clauses. *Belton v. Board of Police Com'rs of Kansas City*, 708 S.W.2d 131 (Mo. banc 1986). As a permanent teacher entitled to the protection of the Missouri Teacher Tenure Act, Moore had a property interest in continued employment protected by both procedural and substantive due process. §§ 168.114-168.120, RSMo 1986. Thus, Moore was entitled to procedural due process before his employment contract could be terminated.

The Due Process Clauses require that in order to deprive a person of a property interest, he must receive notice and an opportunity for a hearing appropriate to the nature of the case. *Belton*, 708 S.W.2d at 137. Due process contemplates the opportunity to be heard at a meaningful time and in a meaningful manner. *Nixon v. Williamson*, 703 S.W.2d 526 (Mo. App. 1985). The dispositive issue

before this Court then rests upon whether the failure to grant the continuance deprived Moore of a fair hearing because he was not given the opportunity to be heard at a meaningful time and in a meaningful manner.

We must first address whether by leaving the hearing, Moore waived his right to due process. Due process merely affords the opportunity to be heard and, thus, a party can waive his due process right to be heard by voluntarily absenting himself from the proceedings. *Birdwell v. Hazelwood School Dist.*, 491 F.2d 490, 494 (8th Cir. 1974). If the claimant's due process rights have been violated prior to his abandonment, then the claimant has not waived his rights because he was not afforded a fair hearing and, thus, is entitled to relief. On the other hand, if the hearing complied with the requirements of due process up to the time claimant left the hearing, then the claimant's decision to leave and his failure to cross-examine witnesses, to make objections and to present his evidence waives his right to complain of anything thereafter. One faced with such a dilemma gambles as to whether the reviewing court will, indeed, find a violation of due process. Moore left the hearing upon the denial of his continuance. Therefore, we must determine whether, at this point, the Board had provided a fair hearing that complied with due process.

The Board makes two ancillary arguments in support of its action; we reject both. The Board points out that the hearing was held under strict time constraints because some members might be replaced at the Board election scheduled 14 days after the hearing. Section 168.118(5) provides that a transcript must be furnished to the Board within ten days following the hearing, leaving only three days until the election in which to make a decision and

prepare written findings of fact and conclusions of law.[1] Although this schedule creates a problem, this does not justify the Board's failure to take the time necessary for a proper hearing, if, in fact, another session was required to properly complete the hearing. The Board's counsel points to the fact that Moore requested a continuance to prepare his defense to the charges. This request does not justify the Board's refusal of a continuance on the night of the hearing if, in fact, such a continuance was necessary to afford due process. The ultimate responsibility for the scheduling rested upon the Board. The Board served the warning letter on May 19, 1989, and, under section 168.116.2 could have proceeded by serving charges within thirty days thereafter, rather than shortly before the election. The hearing could have been scheduled as early as July 1989, instead of March 1990. It was the Board's responsibility to schedule the hearing with sufficient time to afford Moore a hearing that complied with due process. Thus, the shortage of time should not be a factor in justifying the denial of any necessary continuance.

The Board also argues that their refusal to give a continuance is irrelevant because it would not have changed the result. In essence, the Board is arguing that they do not have to afford the claimant due process if his claim is without merit. We unequivocally reject this

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[1] Neither party suggested the possibility of expediting the transcript. It is common practice in litigation to pay the court reporter an extra fee to receive a deposition or trial transcript within one or two days after a hearing. Even if arrangements had not been made to expedite the transcript for the first evening session, it should have been possible to obtain an expedited transcript of an additional session within the time in which the non-expedited transcript for the first session was received.

contention. Compliance with the Due Process Clauses does not depend upon the merits of the claim.

The granting or denying of a continuance rests in the sound discretion of the tribunal and will not be disturbed on appeal in the absence of a showing of abuse of that discretion. *Becker v. Missouri Dept. of Corrections and Human Services*, 780 S.W.2d 72 (Mo. App. 1989). Abuse of discretion means an "untenable judicial act that defies reason and works an injustice." *Jennings v. City of Kansas City*, 812 S.W.2d 724, 736 (Mo. App. 1991). An administrative agency is given broad discretion in such decisions and "the appellate court will give every possible intendment to the decision of the [agency] and such ruling will not be set aside unless it is shown that the denial of a continuance is abused by an arbitrary and capricious ruling." *Becker*, 780 S.W.2d at 78.

At the beginning of the hearing, as well as in discussing claimant's motion for a continuance at 2:15 a.m., there were references to the possibility of completing the entire hearing during this session. The dissent interprets the discussion in connection with the motion for continuance to require that the entire hearing be completed at this session. However, the Board President did not state unequivocally that the hearing would continue on this evening until it was fully completed. We interpret the thrust of the ruling as leaving in abeyance the question of whether the Board would consider a renewed motion for continuance at a later time. Mr. Mickes, the attorney representing the Superintendent, stated, "I would suggest that we continue to proceed and cover as much ground if not all of the ground as we can." Later in the discussion, Mr. Mickes said, "Whether we are able to complete totally tonight or not, we certainly have time to complete a substantial part of the case so we don't wind up having to

do this another night." This discussion left open the possibility of a continuance later in the hearing.

Moreover, the granting of a continuance under these circumstances depends upon the effect of the late hour upon the ability of all of those present to participate in the hearing in a meaningful way. The mere fact that an administrative hearing extends well into the night, without a showing that the claimant, his attorney or his witnesses were in any way exhausted or unable to perform their duties, is insufficient to show a violation of due process. *Bills v. Arizona State Board of Education*, 819 P.2d 952, 955 (Ariz. Ct. App. 1991). The record in the present case is silent in this respect. Although we take judicial notice that at 2:15 a.m. most people are tired and probably not as alert as earlier in the evening, Moore's argument would be stronger with a better record.

In his motion for a continuance, Moore's counsel argued primarily that Moore should not be required to present his witnesses at this late hour. In fact, the hearing had not reached the point where Moore was being called upon to present his evidence; Mr. Buell, the high school principal, had just completed his direct testimony and had been tendered for cross-examination. It is not unusual for a tribunal to make every effort to complete both the direct and cross-examination of the witness on the stand before adjourning. As it turned out, Moore would not have been required to call his witnesses and present his defense until some time after 5:48 a.m. when the Superintendent ultimately rested his case. Cross-examination by Moore would have further delayed the presentation of Moore's defense. Moore's decision to abandon the hearing deprives us of the opportunity to find out whether the Board would actually have required him to go forward with his own case and complete the hearing without a continuance. We

have little doubt that had the Board required Moore to complete the entire hearing at this session, that his right to a full and fair hearing as required by due process would have been violated.

This Court must defer to the agency and, thus, is bound to uphold the agency's ruling unless a clear abuse of discretion has been demonstrated. The burden of demonstrating such abuse rested on Moore. Although this is a very close case, we find that the Board's decision to proceed with the cross-examination of the witness then on the stand was not unreasonable. In view of the discretion lodged in the Board to grant or refuse a continuance and taking the Board's ruling in its most favorable light to the agency on appeal, this Court concludes that the decision of the Board should be affirmed.

Moore raises two other points on appeal. Moore claims the Board waived its right to bring charges against Moore because new contracts were issued following the warning letter. We recently rejected this contention in *O'Connell v. Springfield School District*, ____ S.W.2d _____ (Mo. banc 1992) (No. 74218, slip op. at 13-14, decided April 21, 1992). In addition, Moore argues that the immoral conduct charged against him involved his operation of a bail bond business and that this does not constitute immoral conduct as a matter of law. It is unnecessary for this Court to consider this argument because the charges against Moore concerning the bail bond business actually involved the issue of whether the operation of such a business during school hours constituted immoral conduct. The nature of the business Moore carried on outside of school hours was not at issue. Moreover, there were numerous other charges the Board found to be true that were fully supported by the evidence as well as by Moore's admissions.

We reverse and remand to the trial court with instructions to reinstate the decision of the Board.

ELWOOD L. THOMAS,
Judge

SUPREME COURT OF MISSOURI
en banc

LISLE H. MOORE,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 74255
	)	
BOARD OF EDUCATION OF FULTON PUBLIC SCHOOL DISTRICT NO. 58,	)	
	)	
Appellant.	)	

DISSENTING OPINION

I am of the opinion that the Board of Education failed to accord the tenured teacher a hearing that complied with minimal standards of due process and, so, dissent. I would affirm the judgment of the circuit court.

A tenured teaching position is a valuable asset that can be divested only for cause, following notice and hearing. §§ 168.114-168.120, RSMo 1986. The protection of the teachers' rights is committed, in the first instance, to the Board of Education, which hears the evidence and definitively resolves factual issues. *Ross v. Ross*, 662 S.W.2d 757 (Mo. banc 1983), rejecting the claim that the Board could not hear and dispose of charges initiated by it or its superintendent. The law provides for a limited review in circuit court, during which procedural questions relating to the hearing may be addressed along with points

about the sufficiency of the evidence, which are not involved here. The courts afford great deference to the Board, both as to substantive and procedural requirements, but the ultimate resort on questions of law is to the courts.

Any experienced practitioner can empathize with the scenario presented by this record. The Board convened a hearing at 7 p.m., hoping to conclude it in a single sitting. At 2:15 a.m. the direct examination of an important witness, the school principal, was completed, and the witness was turned over for cross examination. At this time the Board had other witnesses, and the teacher had 20 sequestered witnesses he intended to call. Counsel for the teacher asked that the hearing be adjourned. The Board, after receiving incorrect and misleading advice from its counsel, said, "Carry on." There was no suggestion that the hearing continue only through the cross-examination of the principal, or that it continue until the Board put on its case. Counsel for the Board, who was in the best position to know, gave no estimate as to when he might complete his case. There was no suggestion that the teacher's counsel could excuse his witnesses, so that they could be heard at an adjourned session. Counsel for the Board said that he wanted to avoid "having to do this another night."

The hearing continued, without cross examination of the Board's witnesses, until 5:45 a.m. The teacher's counsel had objected to requiring the teacher "to commence sometime here 3:00 or 4:00 o'clock in the morning to present his defense of these charges ...." Had there been any cross-examination, the actual defense could not have started until much later. The Court now says that the right of cross-examination was waived by counsel's withdrawing from the hearing, which would be so under

normal conditions. But counsel properly anticipated what would happen if they remained. Any question on cross-examination would bring forth scowls, or yawns, or both, from the Board members. The continued hearing, under these circumstances, would be a charade.

The Board's decision was actuated by the advice of its counsel, which, as the Court's opinion points out, was patently incorrect. Counsel grossly exaggerated the time constraints and stated, incorrectly, that the Board that heard the evidence had to decide the case. A decision may be rendered by the Board in office, if the procedural requirements have been met. The successor Board would have full authority to act on the case. Coupled with the circumstance that the school authorities had set the schedule, and had not acted so promptly as they could have, counsel's protestations of time constraints were quite misleading. A detached observer might conclude that the Board was anxious to have the case decided so that it could be used in the campaigning for the approaching election.

The Court's opinion frankly states as follows:

> We have little doubt that had the Board required Moore to complete the entire hearing at this session, that his right to a full and fair hearing as required by due process would have been violated.

But the Court goes on to excuse the Board by saying:

> We find that the Board's decision to proceed with the cross-examination of the witness then on the stand was not unreasonable.

The suggestion that the Board's decision was limited to the cross-examination of the principal does not accurately reflect the record. The Board's counsel wanted to avoid, at all costs, the necessity for having to come back another

night. How any recess could be directed, within this constraint, is difficult to fathom. Counsel for the teacher had absolutely no reason to believe that a later request for adjournment would be received any more favorably, when Board counsel's impatience and misleading advice is factored. They could not safely release their witnesses. Had the teacher's counsel sought to make a record in any detail, they would be accused of filibustering. The Court carries the principle of deference too far, in reforming the Board's manifest decision.

The Court says:

> We interpret the thrust of the ruling as leaving in abeyance the question of whether the Board would consider a renewed motion for continuance at a later time. ...

This is inappropriate deference, without the least record support. We should not, in the interest of deference, condone manifest injustice.

The Court cites the case of *Bills v. Arizona State Board of Education*, 819 P.2d 952 (Ariz. App. 1991), for the proposition that:

> [T]he mere fact that an administrative hearing extends well into the night, without a showing that the claimant, his attorney, or his witnesses were exhausted or in any way unable to perform their duties, is insufficient to show a violation of due process. ...

The *Bills* case is so different factually that its citation is not only without value, but positively misleading. There a school board presented its case during the day, concluding at 6 p.m. The teacher asked for an adjournment; which was denied, and he then put on his case. Closing arguments were had, and the Board began deliberations at 1:30 p.m. Here, counsel was confronted at 2:15 p.m., with

prospects for a hearing that might well continue until the afternoon. Neither the Board nor its counsel gave any suggestion of any other possibility. It is not improbable that they actually courted a waiver and hoped that counsel would withdraw.

It simply was not possible to conclude a meaningful hearing under these circumstances. Counsel should not have to faint, or profess chest pains, in order to demonstrate that people do not fare well in tasks requiring serious intellectual application after 2 o'clock in the morning. It is good in most cases to require counsel to make a detailed record, but there are times when it is patent that the making of a record would do no good. In these situations the Court should not use the record as an excuse.

The damage is not repaired by the offer to the teacher, three days later, of the opportunity to present affidavits of his witnesses who were not heard. This was simply a belated effort to shore up the record. Counsel could appropriately sense that the affidavits would do no good. There are times when it is proper to receive affidavits in advance of testimony, so as to determine issues of materiality or to reduce the volume of cumulative evidence. Under the circumstances of this case, however, the offer to receive affidavits does not correct the unfairness.

It is significant that the circuit court found the hearing to be lacking in due process. That court, like this Court, is a reviewing court in cases of this kind. It does not retry the facts. But we often rely on the trial courts to scrutinize complicated records, which is a task not ordinarily allotted to us. The circuit court has less of an ivory tower appearance than do appellate courts and, I believe, viewed the record more realistically than does this Court.

I gain a distinct impression from the entire record, coupled with the Board's briefs and its counsel's argument here, that the Board had made up its mind well in advance of the hearing and sought to get through, as soon as possible, a procedure that it considered to be a burdensome formality. The Court properly rejects counsel's argument that the Board's case was so strong that no further hearing was necessary, but the very making of this argument supports my impression. It also casts doubt on counsel's role as advisor to and principal spokesman for the Board on the procedural aspects of the hearing.

Boards of Education exercise great responsibility. Their members necessarily are not learned in the substantive and procedural requirements of the law, and it is the duty of the courts to instruct them in the requirements of a fair hearing, especially in cases in which their counsel may have given misleading advise. They are not attuned to procedural requirements. It is neither difficult nor unreasonably burdensome to conduct disciplinary or discharge hearings that comply with the internal and external standards of fairness. Here the Board has fallen short.

The judgment of the Circuit Court, setting aside the dismissal, should be affirmed.

Charles B. Blackmar,
Senior Judge

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September 22, 1992

Ms. Janice A. Harder
Suite 300
1001 East Walnut Street
Columbia, Missouri 65201

In re: Lisle H. Moore, Jr. vs. Board of Education of
Fulton Public School No. 58
Supreme Court No. 74255

Dear Ms. Harder:

Please be advised that the Court this day entered the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."
Price and Limbaugh, JJ., not participating.

Very Truly yours,
THOMAS F. SIMON

Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

/csm

cc: Mr. John W. Inglish
Mr. Thomas A. Mickes
Mr. Thomas M. Dunlap

Supreme Court, U.S.
FILED
JAN 14 1993
OFFICE OF THE CLERK

Case No. 92-1036

IN THE UNITED STATES SUPREME COURT

October-June 1992 Term

Lisle H. Moore, Jr., Petitioner

v.

Board of Education of Fulton Public School No. 58, Respondent

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On Petition for Writ of Certiorari
from the Supreme Court of Misssouri

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Public School No. 58

RESPONSE TO PETITIONER'S QUESTIONS PRESENTED

1. The allegations found in Petitioner's Question 1 are not presented by this case.

Petitioner's first question misrepresents the issue decided by the Missouri Supreme Court and the standard of review applied to that issue. The court did acknowledge the general principle that the granting or denying of a continuance rests in the sound discretion of the tribunal and will not be disturbed on appeal absent a showing of abuse of discretion. However, the court independently analyzed — as a question of law — whether the denial of the continuance at the precise moment it was requested in the hearing before the Board of Education was a violation of Petitioner's right to due process and therefore an abuse of discretion. The court found that the denial was not an abuse of discretion at that moment and that Petitioner's abandonment of the hearing deprived the court of the opportunity to determine whether a subsequent denial would have deprived Petitioner of his right to due process. Therefore, contrary to Petitioner's allegations the court did not defer to the Board of Education's discretion in determining whether Petitioner had received a fair hearing.

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OPINIONS BELOW

Petitioner omitted the following information regarding the opinions below:

On August 20, 1991, the Missouri Court of Appeals for the Western District, in Case No. 43955, captioned *Lisle H. Moore, Jr. v. Board of Education of Fulton Public School District No. 58*, issued its opinion reversing the judgment of the Circuit Court, and reinstating the decision of the Board of Education. However, opinions of the Missouri Court of Appeals in cases transferred to the Supreme Court of Missouri are not published in the permanent law reports. Therefore the opinion is not included herein as an appendix.

JURISDICTION

Petitioner cites only the relevant statute to invoke the Court's jurisdiction in this case. However, Petitioner has not offered any special or important reason, either in his jurisdictional statement or in his argument, why this case merits the Court's attention. Supreme Court Rule 10 provides as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> . . . .
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioner has not alleged anywhere in his Brief that the decision of the Missouri Supreme Court conflicts with the decision of another state court of last resort or of a United States court of appeals. Nor does Petitioner contend that the Missouri Supreme Court decision conflicts with applicable decisions of this Court. Moreover, given the nature and specificity of the question it is unlikely that the Court has settled the specific question. Petitioner does allege that the question of federal law presented in this case should be decided by the Court. However, Petitioner has failed to provide any substantive reasons, much less persuasive ones, why the issue in this case may correctly be characterized as "an important question of federal law."

STATEMENT OF THE CASE

Petitioner has omitted several material facts from his Statement of the Case. First, at the hearing before the Board of Education, Petitioner had testified before the continuance was requested. During Petitioner's testimony, he admitted that he had operated a bail bond business on school property during school hours (Tr. at 60-62; Pet. Appendix at 23-28),[1] that he had repeatedly left students unsupervised in direct violation of Board policy (Tr. at 68-69; Pet. Appendix at 17, 18, 28), that he had refused to follow the directives of the Superintendent of Schools and the high school Principal to reinstate a student to band (Tr. at 24-29; Pet. Appendix at 19), and that he had cursed the Principal in front of students (Tr. at 39-41; Pet. Appendix at 19). In addition, Petitioner had presented the testimony of five of his witnesses prior to the denial of the continuance. (Tr. at 129-199.)

Petitioner suggests that the Board denied his request for a continuance following a single sentence recommending denial of the continuance by District's counsel. However, the record shows that the Board listened to argument from both counsel before reaching a final decision to deny Petitioner's request. Most important, however, the Board merely denied the continuance at the time it was requested — following the direct examination of the high school Principal and prior to his cross-examination. The Board did not state that a continuance would be denied if Petitioner renewed his request at a more appropriate time. Instead of remaining at

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[1] Citations are designated as follows: Transcript of the Hearing Before the Board of Education, "Tr. at ___"; Petitioner's Appendix, "Pet. Appendix at ___."

the hearing, and requesting a continuance at the conclusion of the cross-examination, Petitioner and his attorneys abandoned the proceeding.

ARGUMENT

Point 1: Standard of Review

Question presented: Whether the Missouri Supreme Court applied an inappropriate standard of review of an administrative decision when the court deferred to the Respondent Board of Education's discretion in determining whether Petitioner received a fair hearing.

Petitioner's first question misrepresents the issue decided by the Missouri Supreme Court and the standard of review applied to that issue. The court did acknowledge the general principle that "[t]he granting or denying of a continuance rests in the sound discretion of the tribunal and will not be disturbed on appeal absent a showing of abuse of that discretion." (Pet. Appendix at 46.) However, the court independently analyzed — as a question of law — whether the denial of a continuance, at the precise moment it was requested in the hearing before the Board of Education, was a violation of Petitioner's right to due process and therefore an abuse of discretion. *Id.* at 43-44. The court found that the Board's decision to proceed with the cross-examination of the witness testifying at the time the request was made was not unreasonable and therefore was not an abuse of discretion. *Id.* at 48. The opinion further stated that Petitioner's abandonment of the hearing deprived the court of the opportunity to determine whether a subsequent denial of a continuance would have deprived Petitioner of his right to due process. *Id.* at 47. Therefore, the Missouri Supreme

Court did not defer to the Board of Education's discretion in determining whether Petitioner had received a fair hearing.

The foregoing discussion establishes that Petitioner's first question is not presented in this case and should not be considered by the Court in deciding whether to grant the instant Petition for Writ of Certiorari. Respondent will nevertheless address Petitioner's argument in detail for two reasons: (1) to clarify why Petitioner's question is not presented in the instant case and (2) to preserve Respondent's right to address the issues included in the question if necessary in the future. Respondent further notes that much of Petitioner's argument under his first "Question Presented" is devoted to a substantive discussion of why the Board's denial of the continuance allegedly constituted a violation of due process. This portion of the argument would more properly appear under Petitioner's second "Question Presented." To facilitate comparison of the parties' arguments, however, Respondent will address each of Petitioner's arguments under the Question in which they appear in his Brief.

Petitioner's argument is premised upon (1) a misstatement of the Missouri Supreme Court's opinion in this case and (2) speculation about what might have occurred if Petitioner had remained and requested a continuance after the cross-examination of the witness then on the stand. First, Petitioner contends that the court did not review the Board's decision to deny the continuance as a question of law.[2]

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[2] Petitioner cites *Wolfe v. Missouri State Training School for Boys*, 517 S.W.2d 138 (Mo. 1974) (en banc), to suggest to this Court that either Respondent or the Missouri Supreme Court has espoused the position that decisions of administrative bodies on questions of law are binding upon

Petitioner further alleges that the Court deferred to the Board's decision that it had granted Petitioner a fair hearing. However, Petitioner's argument ignores the plain language and carefully stated logic of the opinion.

The court set forth the following due process analysis:

1. Petitioner must have a property interest to be entitled to invoke the mandate of procedural due process.
2. The Missouri Teacher Tenure Act conferred a property interest in his employment as a permanent teacher.
3. Thus, Petitioner was entitled to due process.
4. Due process requires notice and an opportunity for a hearing before a person may be deprived of his property interest.
5. The opportunity to be heard must be at a meaningful time and in a meaningful manner.

After setting forth its analysis, the court identified the dispositive issue in the case: "[W]hether the failure to grant the continuance deprived [Petitioner] of a fair hearing because he was not given the opportunity to be heard at a meaningful time and in a meaningful manner." (Pet.

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reviewing courts. Respondent has never taken this position, nor was it embodied in the Missouri Supreme Court's opinion. The long-standing and well-settled law of Missouri is directly to the contrary. *Franklin v. Board of Directors, School District of Kansas City*, 772 S.W.2d 873, 878 (Mo. Ct. App. 1989) ("the Court is not bound by the Board's decisions concerning questions of law").

Appendix at 43-44.) The first step in the court's analysis was to determine whether Petitioner had waived his right to due process by leaving the hearing. The court found that if Petitioner's due process rights had been violated prior to his abandonment of the hearing, he had not waived his right to due process. *Id.* at 44.

Therefore, the court next examined whether, as a matter of law, Petitioner had received a fair hearing that complied with due process up to the point at which he left the hearing. The court rejected two of the Board's arguments as a matter of law: (1) that a shortage of time before the impending Board election required the hearing to be completed promptly, and (2) that granting a continuance would not have changed the outcome of the hearing. *Id.* at 44-46.

Continuing its analysis, the court acknowledged the general principle that "[t]he granting or denying of a continuance rests in the sound discretion of the tribunal and will not be disturbed on appeal in the absence of a showing of abuse of that discretion." *Id.* at 46. The court then analyzed whether, as a matter of law, the Board had abused its discretion. The opinion set forth the legal standard for abuse of discretion: an "untenable judicial act that defies reason and works an injustice." *Id.* (citing *Jennings v. City of Kansas City*, 812 S.W.2d 724, 736 (Mo. Ct. App. 1991)). The court then applied that legal standard to the facts of the case.

First, the court found the evidence did not support Petitioner's contention that the denial of the request inevitably meant that the hearing would continue to completion. Board's own counsel acknowledged that the hearing might not be completed in one night. In addition, it was not unusual for a tribunal to make every effort to try to complete both the direct and cross-examination of the witness

on the stand before adjourning. Therefore, the possibility existed that a subsequent request for a continuance, made at a more appropriate time in the hearing, would have been granted. *Id.* at 46-47.

Second, the court found that mere lateness of the hour was insufficient to establish a violation of due process without some evidence that Petitioner, his counsel, or witnesses were unable to perform their duties in a meaningful way. The court noted that the record was silent with regard to potential prejudice. *Id.* at 47.

Finally, the court stated that Petitioner's decision to abandon the hearing deprived the court "of the opportunity to find out whether the Board would actually have required him to go forward with his own case and complete the hearing without a continuance." *Id.*

The court found that based upon the evidence in the record, Petitioner had failed to carry his burden of demonstrating that the Board's denial of the continuance was a clear abuse of discretion. The court indicated the Petitioner had no one but himself to blame for his failure to carry that burden. Petitioner had failed to enter any evidence of prejudice into the record at the time of the initial denial of his request, and had abandoned the hearing rather than renewing his request at the close of the principal's cross-examination. *Id.* at 47-48.

The foregoing exposition unequivocally establishes that the court's opinion does not rest upon deference to a purported determination by the Board that it had granted Petitioner a fair hearing. The court's opinion is a carefully reasoned analysis of whether, as a matter of law, the Board's denial of the continuance at the time it was requested deprived Petitioner of his right to due process.

Petitioner interjects several ancillary issues under his first "Question Presented." However, these issues are

irrelevant to the question of whether the Missouri Supreme Court used the proper standard of review. Furthermore, Petitioner has misinterpreted or misapplied each of the cases he cites for his propositions.

Petitioner asserts that members who were not yet elected to the Board of Education could have participated in the vote regarding the termination of Petitioner's employment. This contention is irrelevant because the Missouri Supreme Court specifically rejected the Board's argument that time constraints created by the election justified denial of the continuance. Furthermore, the case cited by Petitioner, *Webb v. Kansas City Board of Police Commissioners*, 736 S.W.2d 451 (Mo. Ct. App. 1987), is not analogous to the instant case. In *Webb*, the agency's decision was remanded for more detailed findings of fact, which were rendered more than three years after the original employment decision had been made. New members of the board, as well as a retired member who had participated in the original decision, signed the new decision and findings. *Id.* at 452. The resolution was an ad hoc arrangement born of necessity and does not support the argument that one board may hear the evidence in an employment matter and a different board may render the original decision a few weeks later.

Petitioner next cites *Forehand v. School Board of Gulf County*, 600 So. 2d 1187 (Fla. Dist. Ct. App. 1991), for his contention that the Board's attorney should not have acted as prosecutor of the case and as legal advisor to the Board. This issue was not addressed by the Missouri Supreme Court and is not part of this case. Moreover, the issue has been settled by Missouri courts in accordance with Missouri law.

> "[T]he active participation of a school board's attorney in the conduct of a hearing . . . does not in itself deprive one of a fair trial; . . . .

> (Citations omitted.) Absent a showing in the record that, as a result of the attorney's participation, the Board heard the evidence with an unbendable or preconceived notion that petitioner was guilty as charged, no denial of a fair trial occurred."

Ross v. Robb, 662 S.W.2d 257, 260 (Mo. 1983) (en banc). Even if the issue were relevant and part of this case, Petitioner has not offered one shred of evidence that the Board's attorney created among the members of the Board "an unbendable or preconceived notion that Petitioner was guilty as charged."

Petitioner's third ancillary contention is that the Board wanted to decide the case promptly to use the outcome for political advantage. Again, this issue was not addressed by the Missouri Supreme Court and is not part of this case. Furthermore, Petitioner is engaging in the wildest form of speculation about the motivation of the members of the Board. It is equally consistent to presume that some members might have preferred to postpone the vote until after the election to defer criticism for their decision. Petitioner cites *Vance v. Lopez*, 509 S.W.2d 197 (Mo. Ct. App. 1974), in an attempt to bolster his suggestion that the Board had some ulterior motive for wishing to complete the hearing in a reasonable length of time. *Vance* does stand for the proposition that politics has no role in deciding whether a teacher should be discharged and that such decision should be based on merit. *Id.* at 202. However, the questions before this Court do not contain any allegation that the decision to terminate Petitioner was made on any other basis than his absence of merit.

In addition, Petitioner maintains that Board findings 76 and 78 confirm that the Board wanted to reach a decision before the election, and the findings therefore lead to the

ineluctable conclusion that the Board intended to conduct the hearing to its completion in one session. However, Board findings 76 and 78 are not inconsistent with the desire to proceed with the hearing for a while at the time Petitioner requested a continuance, followed by a decision to grant a continuance later in the hearing.

Finally, Petitioner suggests that the hearings should have been conducted over a series of evenings as a matter of law. However, Petitioner merely recites the facts of *Saunders v. Reorganized School District No. 2 of Osage County*, 520 S.W.2d 29 (Mo. 1975), and compares the length of the transcripts in each case to support her position. Recitation and comparison of facts does not constitute legal precedent.

Petitioner correctly states that the question of whether a hearing is fair and properly conducted is for the courts. That is exactly where the question of whether Petitioner received a fair hearing was decided. The Missouri Supreme Court set forth a comprehensive legal analysis to determine if the Board had abused its discretion. The court then applied that analysis to the facts of Petitioner's case. Petitioner merely disagrees with the result of that analysis. The court did not defer to any determination by the Board that it had provided a fair hearing. The court rendered a judgment on the facts in accordance with the law. This is not a "manifest injustice." On the contrary, it is "Equal justice under the law": the standard to which every tribunal should aspire.

Point 2: Due Process

Question presented: Whether Respondent Board of Education violated Petitioner's right to due process under the 14th Amendment to the United States Constitution when the Board denied Petitioner's request for a continuance of Petitioner's employment termination hearing when such request was made at 2:15 a.m. following seven and one-half hours of hearing.

At the beginning of Petitioner's second point, he urges the Court to look at substance to determine whether constitutional minimums have been honored. However, Petitioner's entire argument on this point relies upon speculation about what might have occurred if Petitioner and his attorneys had not abandoned the hearing. Petitioner cites no authority to support his contention that the denial of the continuance at the conclusion of the Principal's direct examination deprived him of due process.[3]

Petitioner invites this Court to grant its Petition because the Missouri Supreme Court noted in dicta that if Petitioner had remained, and the Board had denied a later request for a continuance, Petitioner's due process rights most likely would have been violated. Petitioner punctuates this invitation with an assertion that the record is clear that

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[3] Petitioner asserts that during the process of his appeal, no cases have been found with facts analogous to Petitioner's case. However, Petitioner pointedly ignores *Bills v. Arizona State Board of Education*, 819 P.2d 952 (Ariz. Ct. App. 1991), which was cited and discussed by the Missouri Supreme Court.

Petitioner would have been required to remain throughout the night and into the next day if he had not abandoned the hearing. However, Petitioner ignores the Missouri Supreme Court's specific finding to the contrary. The court emphasized that the evidence established that a subsequent request for a continuance might have been granted.

Furthermore, the Missouri Supreme Court emphasized that Petitioner's own conduct and the conduct of his attorneys had prevented the court from having the necessary record to determine if Petitioner's rights had or would have been violated. First, the record contained no evidence of actual prejudice by the denial of Petitioner's only request for a continuance. Second, "[Petitioner's] decision to abandon the hearing deprives us of the opportunity to find out whether the Board would actually have required him to go forward with his own case and complete the hearing without a continuance." (Pet. Appendix at 47.) Third, the burden of demonstrating that denial of the continuance was an abuse of discretion rested on Petitioner. Petitioner failed to carry that burden.

Petitioner also fails to carry his burden before this Court. He has not cited a single case to support his argument. Therefore the Court should apply the standard set out in *Birdwell v. Hazelwood School District*, 491 F.2d 490, 495 (8th Cir. 1974), to the present case:

> The fundamental requirement of due process "is the opportunity to be heard . . . . 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'"
>
> The opportunity thus demanded was here afforded but [Petitioner] deliberately chose not to avail himself of it . . . . He cannot now scour the record of the hearing he

> thus ignored for flaws in its conduct. We find a voluntary and knowing waiver.

Id. (citations omitted).

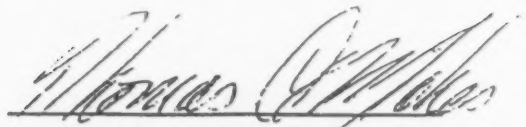
Petitioner voluntarily absented himself from the hearing. Petitioner may not now ask this Court to compensate for his bad judgment by finding that the Board would have violated his right to due process if he had remained.

CONCLUSION

Respondent respectfully requests this Court to deny the instant Petition for Writ of Certiorari to United States Supreme Court. The Missouri Supreme Court properly reviewed the issue of whether the Board abused its discretion in denying the continuance as a question of law. The court determined that the Board had not abused its discretion because (1) the request was made at an inappropriate time during the hearing, (2) the possibility was left open that the hearing would not be completed in one session, and (3) Petitioner failed to offer any evidence of prejudice resulting from the denial. The court found that Petitioner's due process rights had not been violated prior to his abandonment of the hearing and refused to engage in speculation about whether his rights would have been violated if he had remained. Petitioner, and others in similar situations, may not abandon proceedings in which they have received an opportunity to be heard and then look to the courts for protection.

Wherefore, for all the foregoing reasons, Respondent respectfully requests this Court to deny the instant Petition for Writ of Certiorari.

Respectfully submitted,



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